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# SALE OF GOODS IN THE UNIFORM COMMERCIAL CODE

*Robert Braucher\**

## INTRODUCTION

By the end of 1965 the Uniform Commercial Code had been enacted in forty-two states, the District of Columbia, and the Virgin Islands, and further enactments were expected during 1966.<sup>1</sup> In January 1966 it was already in force in all but ten of the enacting jurisdictions, and had been in actual operation for more than ten years in Pennsylvania. It was more than a theoretical proposal.

Article 2 on Sales replaces the Uniform Sales Act, promulgated in 1906 and enacted in some thirty-six jurisdictions by 1941. The forty-two Code states include eleven which like Louisiana had never adopted the Uniform Sales Act;<sup>2</sup> by the end of 1965 all but three states<sup>3</sup> had enacted one or the other. The Sales Act was based on the English Sales of Goods Act, 1893, which in turn was largely a codification of English common law decisions rendered during the 19th century.

The Code, like the previous statutory revisions, has preserved much of the basic structure of the English law of sales. But modern commercial practice is reflected in section after section. In 1939, the year before the Code project was born, Professor Llewellyn, who later became the chief draftsman of the Code, urged "that the time is overdue to make one more attempt to unhorse the law of wares."<sup>4</sup> In 1940, in discussing a proposal then pending for the enactment of a Federal Sales Act, Professor Isaacs said that a future archaeologist, analyzing the Uniform Act or the federal adaptation, might well conclude

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1. The enacting jurisdictions are listed in the UCC volumes of the *UNIFORM LAWS ANNOTATED* (Supp. 1964). Enactments during 1965 leave Arizona, Delaware, Idaho, Louisiana, Mississippi, South Carolina, South Dakota, and Vermont as the states where the Code has not been enacted.

2. Florida, Georgia, Kansas, Missouri, Montana, New Mexico, Oklahoma, North Carolina, Virginia, Texas, West Virginia.

3. Louisiana, Mississippi, South Carolina.

4. See Llewellyn, *Across Sales on Horseback*, 52 *HARV. L. REV.* 725 (1939), *The First Struggle to Unhorse Sales*, 52 *HARV. L. REV.* 873, 904 (1939).

that the middleman had scarcely emerged, that credit was unusual, that the normal buyer was expected to carry his own goods away—in short, he said, “the framework of our Sales Act is roughly of the Eighteenth Century.”<sup>5</sup>

The Code builds anew on that framework. The Code provisions do not focus on the passage of title to a horse; they refer again and again to the “merchant,” to standardized contract terms, and to problems of credit, shipment, and storage. The most pervasive change from the Sales Act is a shift from property to contract. In the words of the opening Comment to article 2:

“The arrangement of the present Article is in terms of contract for sale and the various steps of its performance. The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor. The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.”

Article 2 contains 104 sections, of which about one-third have no counterpart in the Sales Act. The new provisions relate for the most part to questions which I was brought up to think of as contracts questions rather than sales questions. Accordingly, I propose to devote this first lecture to contractual obligations in the sale of goods. The second lecture will deal with property, creditors' rights, and what Professor Gilmore calls “the commercial doctrine of good faith purchase.”

### CONTRACTUAL OBLIGATIONS

Section 2-401 of the Code provides for the passage of title to goods, but separate provisions are made for rights and obligations, performance and risk, breach, repudiation and excuse, and remedies; and section 2-401 provides that each such provision applies “irrespective of title.” This de-emphasis of title or property is accompanied by expanded treatment of contract

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5. Isaacs, *The Sales Act in Legal Theory and in Practice*, 26 VA. L. REV. 651, 653 (1940).

law affecting sales. Examples of provisions not found in the Sales Act are contained in the Code sections on parol evidence (§ 2-202), definiteness (§§ 2-204, 2-305 through 2-311), offer and acceptance (§§ 2-205 through 2-207), assignment, and delegation (§ 2-210), unconscionable contracts and clauses (§ 2-302), and definitions of trade terms such as "F.O.B." and "C.I.F." (§§ 2-319 through 2-325). In addition there are novel general provisions in article 1, limited either explicitly or by fair implication to transactions within the scope of the more specific articles: waiver of claim after breach (§ 1-107), prima facie evidence by third party documents (§ 1-202), obligation of good faith (§ 1-203), reservation of rights (§ 1-207).

Some of these provisions restate and codify common law or equitable principles; others are new in substance as well as in their statutory form. The same is true of the provisions which replace Sales Act sections on the same subject. Probably the most significant innovations in article 2 are made with respect to the Statute of Frauds (§ 2-201), "firm" offers (§ 2-205), "unconscionable" terms (§ 2-302), risk of loss (§§ 2-509, 2-510), replevin by the buyer (§§ 2-502, 2-716), and the buyer's right of rejection (§§ 2-508, 2-601, 2-612, 2-614). Clearly there are enough changes, both in form and in substance, to give significance to the question of the scope of the Code's application.

*Scope.* The questions of coverage can be divided under three separate headings: type of transaction, territorial application, and effective date. The effective date is the easiest: it is specified in the enacting statute, commonly a year or two after the date of enactment. The other types of questions are illustrated in the Massachusetts decision in *Skinner v. Tober Foreign Motors, Inc.*<sup>6</sup> In October 1959 an airplane was sold and delivered in Massachusetts by a Massachusetts seller to Connecticut buyers, to be kept in Connecticut. The seller retained a security interest for the payment of the price in monthly installments of \$200. Before the first installment was due the buyers had to replace the engine and could not bear the financial burden. The seller orally agreed to reduce the monthly payments to \$100 for the first year, and the buyers made the reduced payments for seven months, through May 1960. But in March the seller demanded resumption of the \$200 payments and in May repossessed and sold the airplane. The buyers sued for damages and

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6. 345 Mass. 429, 187 N.E.2d 669 (1963).

recovered the value of the airplane less the unpaid balance of the price.

The court first held that the contract was governed by Massachusetts law. Connecticut law might, under article 9, have governed the validity and perfection of the seller's security interest, but the issue involved the duties of the parties under the primary obligation, the contract of sale. The transaction bore "an appropriate relation" under section 1-105 to Massachusetts, where the contract was executed, the plane delivered, and the seller had its place of business. Since the Statute of Frauds was not pleaded, the court did not reach the question of the effect of delivery, acceptance, and part payment under section 2-201(3) (c). And the oral modification needed no consideration to be binding under section 2-209(1).

Article 2 is limited by section 2-102 to "transactions in goods," except those "intended to operate only as security transactions." "Goods" is defined in section 2-105 to exclude investment securities and things in action. Yet the comments to sections 1-102 and 2-105, citing a New York case under the Sales Act,<sup>7</sup> invite the application of particular sections by analogy to subject matter intentionally excluded, and particularly to sale of securities, "where reason and policy so require." The Supreme Court of Pennsylvania has noted the invitation without disapproval;<sup>8</sup> and Delaware courts, applying Pennsylvania law, seem to have assumed without discussion that a sale of securities is a sale of goods under article 2.<sup>9</sup>

Application by analogy to sale of securities suggests more remote analogies. What of a construction contract involving an incidental transfer of goods? What of leases of goods? What of contracts for services? Indeed, what of contracts generally? The answers to these questions are not yet known, of course.

7. *Agar v. Orda*, 264 N.Y. 248, 190 N.E. 479 (1934); cf. *Thomas G. Jewett, Jr., Inc. v. Keystone Driller Co.*, 282 Mass. 469, 185 N.E. 369 (1933) (conditional sale); *Blumberg v. Taggart*, 213 Minn. 39, 5 N.W.2d 388 (1942) (transfer of bank deposit); *Morris F. Fogle Co. v. Lisman*, 208 Wis. 1, 240, N.W. 869 (1932) (bonds); *Loew's, Inc. v. Wolff*, 101 F. Supp. 981 (S.D. Calif. 1951), *affirmed*, 215 F.2d 651 (9th Cir. 1954) (sale of literary property). *Contra*, *Porter v. Gibson*, 25 Cal.2d 506, 154 P.2d 703 (1944); cf. *Franck v. J. J. Sugarman-Rudolph Co.*, 40 Cal.2d 81, 251 P.2d 949 (1952).

8. *In re Carter's Claim*, 390 Pa. 365, 134 A.2d 908 (1957). For the background of the Code comments, see Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 810 (1958).

9. *Pennsylvania Co. v. Wilmington Trust Co.*, 166 A.2d 726 (Del. Ch. 1960), *appeal dismissed*, 172 A.2d 63 (Del. 1961); *Wilmington Trust Co. v. Coulter*, 200 A.2d 441 (Del. 1964).

But a separate development has an even broader potential reach: the Code has sometimes been relied on as a source of law in jurisdictions where it was not in force. In a case arising before it had been enacted anywhere, the United States Court of Appeals for the Third Circuit applied a Code rule and said:<sup>10</sup>

"We think provisions of the Uniform Commercial Code which do not conflict with statute or settled case law are entitled to as much respect and weight as courts have been inclined to give to the various Restatements. It, like the Restatement, has the stamp of approval of a large body of American scholarship."

Other courts also have used the Code as a Restatement, particularly in cases decided after enactment but governed by prior law. And last year the Boards of Contract Appeals of both the Armed Services and the Department of the Interior announced that they regarded the Code as a source of the federal law governing contracts with the United States.<sup>11</sup>

It is beyond my scope here to explore the implications of application by analogy and use as Restatement.<sup>12</sup> Suffice it for the present that there are implications and that these techniques, coupled with widespread enactment, may greatly reduce the need for recourse to choice-of-law principles in the law of sales. It may be proper to add that these techniques are most appropriate where the Code rule has respectable common law antecedents and makes no sharp break with local practices. But they may also be legitimate where the analogy or the question whether the Code applies is a close one, or where Code principles

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10. *Fairbanks, Morse & Co. v. Consolidated Fisheries Co.*, 190 F.2d 817, 822, n.9 (3d Cir. 1951), cited with approval in *Budget Plan, Inc. v. Savoy*, 336 Mass. 322, 145 N.E.2d 710 (1957); see *Universal C.I.T. Credit Corp. v. Guaranty Bank & Trust Co.*, 161 F. Supp. 790 (D. Mass. 1958); cf. *Haskins v. Dube*, 101 N.H. 224, 138 A.2d 677 (1958); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Thomas v. First Nat'l Bank*, 376 Pa. 181, 101 A.2d 910 (1954).

11. See *Reeves Soundcraft Corp., ASBCA*, June 30, 1964, 33 U.S.L. Week 2024; *Federal Pacific Electric Co., Interior BCA*, October 23, 1964, 33 U.S.L. Week 2222.

12. See Landis, *Statutes and the Sources of Law*, in *HARVARD LEGAL ESSAYS* (1934), reprinted in 2 *HARV. J. LEGIS.* 7 (1964). For general discussion of codification problems and the Code, see Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 *LAW & CONTEMP. PROB.* 330 (1951); Hawkland, *Uniform Commercial "Code" Methodology*, 1962 *U. ILL. L.F.* 291; Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, 1962 *U. ILL. L.F.* 321; Patterson, *The Codification of Commercial Law in the Light of Jurisprudence*, [1955] 1 *REP. N.Y. LAW REV. COMM.* 41; Vold, *Construing the Uniform Commercial Code*, 50 *CORN. L.Q.* 49 (1964).

and supplementary principles need to be harmonized to protect the legitimate expectations of the parties.

*Offer and acceptance.* Shortly before he began work on the Code, Professor Llewellyn wrote a series of articles on "our case-law of contracts" in which he attempted a comprehensive analysis of problems of offer and acceptance.<sup>13</sup> Recently I have had to review those articles, together with Code provisions on the same subject, in connection with the revision of the Restatement of Contracts. It was surprising how closely the Code provisions followed the suggestions made in the Llewellyn articles, and how ready we all were to accept both as sound restatement of common law principles, not limited like the Code to sale of goods.<sup>14</sup> Here I can deal only with a few highlights.

Section 2-205 on firm offers illustrates a variety of Code techniques. First, as to continuity with prior law, the section provides a substitute for the common law of sealed instruments, which is made inapplicable to sale contracts by section 2-203. The new formality is more limited in scope, and harmonizes better with commercial practice. It does not displace other types of option contracts based on consideration or, where recognized, on the recital of consideration or the payment of a nominal consideration. Second, as to scope, it applies to an offer "by a merchant" to buy or sell goods. "Merchant" is a defined term; the comment to section 2-104 indicates that almost every person in business would be a merchant for this purpose, since "by his occupation [he] holds himself out as having knowledge or skill peculiar to the practices . . . involved." As to non-specialized business practices, the comment says, banks or even universities well may be merchants. It does not apply to a housewife or to an offer with respect to services, but the possibility remains that it may be extended by analogy in a proper case.<sup>15</sup> Third, the firm offer section is one exhibit in support of Professor Llewellyn's statement that "one effort which may have some small promise has been made," in the Code, to deal with the

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13. See Llewellyn, *The Rule of Law in Our Case-Law of Contract*, 47 YALE L.J. 1243 (1938), *On Our Case-Law of Contract: Offer and Acceptance (Parts I & II)*, 48 YALE L.J. 1, 779 (1938-1939).

14. See RESTATEMENT (SECOND), CONTRACTS §§ 12, 19-74 (Tent. Draft No. 1, 1964); Braucher, *Offer and Acceptance in the Second Restatement*, 74 YALE L.J. 302 (1964).

15. *Cf. Wilmington Trust Co. v. Coulter*, 200 A.2d 441 (Del. 1964) (§ 2-205 inapplicable because (1) section in terms applies only to merchants (2) trust company had no power to option (3) offer gave no assurance it would be held open; no reference to exclusion of securities from definition of goods).

problem of the standardized form.<sup>16</sup> In the case of a firm offer "on a form supplied by the offeree," the section requires that the provision be "separately signed by the offeror."

Section 2-206 implements Professor Llewellyn's assault on what he called the "Great Dichotomy" between unilateral contract and bilateral contract, a dichotomy, he said, which "has little relation to the living fact of the business contracting which it divides."<sup>17</sup> Following a suggestion of Professor Whittier, it is recognized that an offer may invite the offeree to choose between acceptance by promise and acceptance by performance.<sup>18</sup> The problem of notification to the offeror is dealt with separately. Unless otherwise unambiguously indicated, an offer invites "acceptance in any manner and by any medium reasonable in the circumstances," and an order for current shipment of goods can be accepted "either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods." Thus the same act can be both acceptance and breach, just as a warranty can be broken when made. Probably the pre-Code law was the same,<sup>19</sup> but it was not always so understood.

Next we come to the Code's provisions on what is sometimes called "the battle of the forms." Buyer orders goods, using his standard order form; seller purports to accept on his standard acknowledgment form, containing terms which do not match those on the order form. Is there a contract? Or subsequent correspondence shows that the parties both think they have a contract, or the goods are shipped and paid for before any dispute arises. What are the terms of the contract? Sections 2-204 and 2-207 codify decisions that "offer and acceptance are not required to meet with geometric precision in order to form a valid contract," where "the parties consistently acted as if they had made a binding agreement."<sup>20</sup> And section 2-207(2) and (3) deal with the question what terms become part of the contract.

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16. See LLEWELLYN, *THE COMMON LAW TRADITION — DECIDING APPEALS* 369 (1960).

17. Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance (Part II)*, 48 *YALE L.J.* 779, 787, 789, 809 (1939).

18. See Whittier, *The Restatement of Contracts and Mutual Assent*, 17 *CALIF. L. REV.* 441, 453 (1929); cf. *RESTATEMENT (SECOND) CONTRACTS* §§ 28-31 (Tent. Draft No. 1, 1964).

19. See 1 *CORBIN, CONTRACTS* § 77 (1963).

20. See *Franklin R. & D. Corp. v. Swift Elec. Sup. Co.*, 340 F.2d 439, 444 (2d Cir. 1964) (pre-Code Law of N. Y. or Conn.).



According to these sections, "conduct by both parties which recognizes the existence of a contract" may establish a contract for sale, even though the moment of making is undetermined, and even though the writings of the parties do not establish a contract. "A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms." The additional terms (Note: not the "different" terms) are treated as proposals for modification; "between merchants," they are accepted by failure to object unless they "materially alter" the contract. Where a contract is established by conduct, the terms consist of those "on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions" of the Code.

Two judicial opinions have applied these provisions to the question whether a particular term was part of a contract.<sup>21</sup> In the *Roto-Lith* case, a federal court was confronted with an order for an adhesive for "wet pack spinach bags," sent from New York to Massachusetts, where the Code was in force. The Massachusetts seller sent acknowledgment and invoice forms bearing a conspicuous no-warranty clause. The adhesive was shipped, accepted, and paid for, but did not stick. The plaintiff buyer claimed that the clause was an additional term which materially altered the contract and so did not become part of it. The court agreed that there was a material alteration, but said that on the plaintiff's reading "the statute would lead to an absurdity. . . . The statute is not too happily drafted. . . . To give the statute a practical construction we must hold that a response which states a condition materially altering the obligation solely to the disadvantage of the offeror is [expressly conditional]." Thus the seller made a counter-offer rather than an acceptance, and the buyer became bound by the terms of the counter-offer when it accepted the goods. The court did not refer to section 2-207(3), which as expounded in the comment seems to call for a contrary result.

*Doughboy Industries*, decided by a New York court under pre-Code law, shows a more sympathetic attitude toward the

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21. *Roto-Lith, Ltd. v. F. P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962); *Matter of Doughboy Industries Inc. (Pantasote Co.)*, 17 App. Div. 2d 216, 233 N.Y.S.2d 488 (1st Dep't 1962).

Code provisions. Again a buyer's order form failed to match the seller's acknowledgment form, and the transaction went forward in disregard of the conflict. The dispute was whether an arbitration clause in the seller's form was part of the contract. Each form contained a fighting clause, and the court said the parties had "accomplished a legal equivalent to the irresistible force colliding with the immovable object." Having decided that under the principles in force before the Code there was no agreement to arbitrate, the court went on to refer to the Code, which had been enacted in New York but had not yet taken effect, as "quite useful":

"But the problem of conflicting commercial forms is one with which there has been much concern before this, and a new effort at rational solution has been made. The new solution would yield a similar result. [The court then quoted the comments to § 2-207.] On this exposition, the arbitration clause, whether viewed as a material alteration under subsection (2), or as a term nullified by a conflicting provision in the buyer's form, would fail to survive as a contract term."

The hostile construction in the *Roto-Lith* case has been much criticized, and it is to be hoped that when the occasion arises the Massachusetts court will consider the matter anew and, like the New York court in *Doughboy Industries*, seek to implement rather than to frustrate the new effort at rational solution.

Two other aspects of contract formation require brief mention. First, as indicated by the *Skinner* case described earlier,<sup>22</sup> modification and discharge are treated separately from the initial contract, and the requirement of consideration is eliminated in cases of modification (§ 2-209; cf. §§ 1-107, 3-605). The comment indicates that the general requirement of "good faith" in the performance and enforcement of Code contracts bars extortion of a "modification" without legitimate commercial reason. Second, section 2-204 provides that "a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." The question of intent, at least if not clearly resolved by the documents, is a question of fact to

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22. See note 6 *supra*.

be resolved in the light of all relevant circumstances.<sup>23</sup> The application of this section is assisted by later sections which fill in missing terms on performance, open price, remedies, and the like (§§ 2-305 through 2-311). Probably the net effect is to encourage the granting of a remedy in cases of indefinite agreements, in harmony with a growing body of authority apart from the Code.<sup>24</sup>

*Statute of Frauds and parol evidence.* Section 2-201 thoroughly revises the Statute of Frauds applicable to sale of goods. Section 2-202 restates what is commonly called the parol evidence rule. Related provisions are found in section 2-209 on modification and in sections 1-205 and 2-208 on usage of trade, course of dealing, and course of performance.

The Statute of Frauds section of the Uniform Sales Act was applicable to choses in action, but the Code provides separately for investment securities (§ 8-319), for security agreements (§ 9-203), and for sales of personal property not otherwise covered (§ 1-206). Section 2-201 is thus confined to sales of goods. Four major changes are made. First, the signed writing need not be complete or accurate; it need only be "sufficient to indicate that a contract for sale has been made between the parties," but the contract is not enforceable beyond the quantity shown in the writing. Second, between merchants a written confirmation sent by one party and received by the other within a reasonable time is sufficient against the recipient if it is sufficient against the sender and the recipient has reason to know its contents and does not object in writing within ten days. Third, the contract is enforceable against a party who admits in court that a contract for sale was made, but not beyond the quantity admitted. Fourth, part payment or acceptance of part of the goods makes the contract enforceable only to the extent of the payment or acceptance.

Decisions in Pennsylvania have read these provisions in the light of the official comments. The Supreme Court of Pennsylvania held a seller bound because it had received a signed letter from the buyer ordering goods "as per our phone conversation

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23. *Pennsylvania Co. v. Wilmington Trust Co.*, 166 A.2d 726 (Del. Ch. 1960) (Pa. law), *appeal dismissed*, 172 A.2d 63 (Del. 1961).

24. See RESTATEMENT (SECOND) CONTRACTS §§ 32-33 (Tent. Draft No. 1, 1963).

of today" and stating a quantity.<sup>25</sup> The object of the statute as revised, the court said, was "the elimination of certain formalistic requirements adherence to which often resulted in injustice, rather than the prevention of fraud." Even though the statute was satisfied, the buyer "must still sustain the burden of persuading the trier of fact that the contracts were in fact made orally prior to the written confirmation." A lower court has held that a demurrer is not such an admission in court as satisfies the statute;<sup>26</sup> there seems as yet to have been no clear ruling on the question whether the admission can be sought by examination before trial.<sup>27</sup> As to part payment, there is a lower court decision denying enforcement where in the case of a single object the payment made is less than the full amount.<sup>28</sup> The text of the Code is not perfectly clear on this point, but the comment seems to permit enforcement only to the extent that the price of an apportionable part has been made.

A word should be added as to modifying agreements. Section 2-209 provides that a modifying agreement needs no consideration to be binding, even though it is oral. It also provides that the Statute of Frauds section must be satisfied if the contract as modified is within its provisions. If this protection is deemed inadequate by the parties, they can adopt their own more severe limitation: "A signed agreement which excludes modification or rescission except by a signed writing" is made effective. If such a clause is on a form supplied by a merchant and is to bind a consumer, it must be separately signed by the consumer. A modification which is not in writing can take effect as a waiver despite these provisions; a separate subsection provides that such a waiver can be retracted unless retraction would be unjust in view of reliance on the waiver.

Section 2-202 on parol evidence does not seem very startling, but it provides a basis for judicial clarification of an area which has been extraordinarily vexed by confusion and uncertainty.<sup>29</sup> Professor Corbin states that it may properly be applied in non-Code states and to transactions other than those for the sale of

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25. *Harry Rubin & Sons, Inc. v. Consolidated Pipe Co.*, 396 Pa. 506, 153 A.2d 472 (1959).

26. *Beter v. Helman*, 41 West. 7 (Pa. C.P. 1958).

27. See Stevens, *Ethics and the Statute of Frauds*, 37 CORN. L.Q. 355 (1952); [1953] REP. N.Y. LAW REV. COMM. 580-581; *Smith v. Muss*, 203 Misc. 356, 117 N.Y.S.2d 501 (1952), *appeal dismissed*, 281 App. Div. 957, 122 N.Y.S.2d 377 (1953).

28. *Williamson v. Martz*, 11 D. & C.2d 33 (Pa. C.P. 1956).

29. See 3 CORBIN, CONTRACTS §§ 573-596 (1960).

goods, and there are decisions which support his statement.<sup>30</sup> Particularly useful is likely to be the statutory recognition that a written agreement may be explained or supplemented by course of performance, course of dealing, and usage of trade. Sections 1-205 and 2-208 direct that these elements of the context be construed whenever reasonable as consistent with the express terms and with each other. When such construction is unreasonable, a hierarchy is established: express terms control course of performance, course of performance controls course of prior dealings between the parties, and course of dealing controls usage of trade.

*Unconscionable terms.* Now we come to one of the most controversial sections of the Code, and one of the most general. Section 2-302 provides that when a court finds a contract or any clause to have been unconscionable when made it may refuse to enforce the contract, enforce it without the offending clause, or so limit the application of the clause as to avoid any unconscionable result. The finding is to be made as a matter of law and the parties are to be afforded a reasonable opportunity to present evidence as to the commercial setting, purpose, and effect of the contract or clause.

The comment cites *Campbell Soup Co. v. Wentz*,<sup>31</sup> a decision in the Third Circuit in which the opinion was written by Judge Goodrich, then also the Director of the American Law Institute. The lower court denied equitable relief to Campbell Soup Company as the buyer in a contract for the sale of carrots, on the ground that the remedy at law was adequate. Disagreeing on this point, the court of appeals nevertheless affirmed because the contract was "unconscionable": "the sum total of its provisions drives too hard a bargain for a court of conscience to assist."

Campbell Soup Company filed a rather plaintive petition for rehearing, urging that the issue of unconscionableness was not considered by the court below, and was not fully presented in briefs and argument of any of the parties. The petition was unsuccessful, but it led to the insertion of subsection (2) of section 2-302, providing for an opportunity to be heard in such

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30. *Id.* § 583 n.94; see *Provident Tradesmens Bank & Trust Co. v. Pemberton*, 196 Pa. Super. 180, 173 A.2d 780 (1962); *Golden Gate Corp. v. Barrington College*, 199 A.2d 586 (R.I. 1964).

31. 172 F.2d 80 (3d Cir. 1948).

cases.<sup>32</sup> Incidentally, it may be suggested, with deference, that there is some exaggeration in the court's statement that Campbell's form had "quite obviously been drawn by a skilled draftsman." The provision which the court thought the "hardest" excused Campbell from taking delivery in certain circumstances, as in the event of a strike. In such a case, the contract provided, "Grower may with Campbell's consent, dispose of his Carrots elsewhere." Read to require the grower to let his carrots spoil, such a clause might well be against public policy, but it seems likely that if such a case had been in issue the same court would have found an implication that consent was not to be unreasonably withheld.

I am suggesting that unconscionableness, like public policy, can be an unruly horse. The comment justifies the section as encouraging judicial candor in substitution for such devices as "adverse construction of language," and cites illustrative cases. It also seeks to tame the beast: "The principle is one of the prevention of oppression and unfair surprise [citing Campbell] and not of disturbance of allocation of risks because of superior bargaining power." There are analogues in other provisions of the Code limiting freedom of contract: Section 1-102 forbids disclaimer of obligations of good faith, diligence, reasonableness, and care. Section 2-309 provides for notification of termination of a contract by one party and makes invalid an agreement dispensing with notification "if its operation would be unconscionable." Section 2-616 denies effect to a clause made in advance of trouble which would require the buyer to stand ready to take delivery whenever the seller is excused from delivery by unforeseen circumstances. Under section 2-718 "A term fixing unreasonably large liquidated damages is void as a penalty." Section 2-719 states, "Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."

Perhaps these more specific provisions help give content to the word "unconscionable." Perhaps it can be held to contracts and clauses which have similar vices. Certainly it is not a warrant for judicial price control. But people worry, and you can see why. A lower court in Pennsylvania held that a clause per-

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32. See Malcolm, *The Proposed Commercial Code*, 6 BUS. LAWYER 113, 156-57, 185 (1951).

mitting recovery of the full price of goods not delivered, without any showing whether they were readily salable "would be in effect 'unreasonably large liquidated damages' and, therefore unconscionable and void."<sup>33</sup> In the famous *Henningsen* decision in New Jersey the court cited section 2-302 in support of its conclusion that the standard non-warranty clause in the so-called warranty of a new automobile "is so inimical to the public good as to compel an adjudication of its invalidity."<sup>34</sup>

More recently, in *American Home Improvement Co. v. MacIver*,<sup>35</sup> the Supreme Court of New Hampshire relied on section 2-302 as an alternative ground of decision. MacIver agreed to buy home improvements for some \$2500, of which apparently \$800 was a salesman's commission and \$809.60 was finance charge. Before delivery MacIver repudiated, and the seller sued him for the \$800 commission paid by it to the salesman. The court denied recovery because of non-compliance with a statute requiring disclosure of finance charges. As "another and independent reason why recovery should be barred," the court said, "Inasmuch as the defendants have received little or nothing of value and under the transaction they entered into they were paying \$1609 for goods and services valued at far less, the contract should not be enforced because of its unconscionable features. This is not a new thought or a new rule in this jurisdiction." There is no need to quarrel with the actual decision in the particular case, but the brevity of the treatment of unconscionableness is troubling. The salesman's commission seems high, but no reference is made to going rates or to alternative sources of supply. The finance charge was for monthly installments over a five-year period, and comes to about nine dollars per year for each hundred dollars of the initial cash balance. This is equivalent to a nominal annual interest rate of less than 18%, and is less than the maximum rate prescribed in small loan laws and retail installment sales acts in many states.<sup>36</sup> As in the *Campbell Soup* case, no reference was made to any oppor-

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33. *Denkin v. Sterner*, 10 D. & C.2d 203 (Pa. C.P. 1956).

34. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

35. 201 A.2d 886 (N.H. 1964), 78 HARV. L. REV. 895; cf. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

36. N.H. REV. STAT. ANN. § 399A:3 (Supp. 1963), added in 1961, permits installment loans at \$16 per year per \$100 of initial loan on the first \$600, \$12 per year per \$100 on the excess up to \$1500. These rates would produce a finance charge of \$1020 on a five-year loan of \$1500, but small loan maturities are limited to 24 months.

tunity to present evidence on the issue; indeed, the report indicates that the plaintiff furnished no brief.

*Warranties and other obligations.* Part 3 of article 2 contains a number of provisions designed to fill in gaps commonly found in sale contracts. I have referred to some of them, and I shall refer to others in the second lecture. For the most part they do not make fundamental changes in pre-Code law, but clarify accepted rules and add specificity. This is generally true, for example, of the warranty provisions (§§ 2-311 through 2-318). But it may be worth noting that rather specific formal requirements are laid down for disclaimers of warranty in Section 2-316, and that that section draws a distinction between disclaimer and limitation of remedy.

Section 2-318 on privity of warranty is already dated. Early drafts of the Code included provisions for direct action against a seller by any natural person injured in person by breach of warranty, if his relation to the buyer was such as to make it reasonable to expect that he might use, consume, or be affected by the goods. In addition a prior seller could be impleaded, and a direct action could be brought against any seller subject to impleader. These provisions were greatly narrowed in 1951 as a result of protests from affected industries.<sup>37</sup> Section 2-318 now includes as beneficiaries of a seller's warranty the family, household, and guests of the buyer; other provisions for direct action have been deleted. Beyond this, according to the comment, "the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain." Eight states have omitted or modified the section in enacting the Code, but the Editorial Board in 1964 rejected a proposal to amend it. The Board said:<sup>38</sup> "The section has been criticized in California as 'a step backward,' and the Wyoming revision codifies the results of recent judicial decisions in many states. See Restatement of Torts 2d § 402A (Tentative Draft No. 7, 1962). But beyond the limits of the present section the subject is still highly controversial, and there appears to be no national consensus as to the scope of warranty protection which is proper. Accordingly, no amendment should be made in the

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37. See Malcolm, *The Proposed Commercial Code*, 6 BUS. LAWYER 113, 157, 162-63, 187-92 (1951).

38. REPORT NO. 2 OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 40 (1964).



Official Text." Meanwhile, the case law has continued to develop, forcing a revision broadening the scope of the Restatement section, treating the liability as absolute liability in tort not subject to warranty limitations, and in some cases extending beyond consumers and personal injury.<sup>39</sup>

*Risk of loss; excuse.* The shift of emphasis in the Code from property to contract is perhaps most evident with respect to risk of loss. Section 2-401 states rules on the passing of title to goods, but confines them to situations "not covered by the other provisions of this Article." Sections 2-509 and 2-510 deal explicitly with risk of loss without reference to title, and sections 2-613 through 2-616 provide for excuse and substituted performance in cases of casualty, force majeure and frustration. Here it will be possible only to sketch the structure and point out the principal innovations.

Risk of loss of course depends on the agreement. Sections 2-307 through 2-311 provide for delivery terms in the absence of contrary agreement; sections 2-319 through 2-327 spell out the delivery obligations created by such standard terms as "F.O.B." Sections 2-501 through 2-508 define the basic concepts of "identification," "tender of delivery," and "shipment," all actions which may be taken unilaterally by the seller, and state the seller's delivery obligations. Then section 2-509 on risk of loss in the absence of breach states separate rules for cases of shipment, for goods in storage, and for all other cases. Section 2-510 then provides for placing the risk on a party who is in breach. If goods are lost or damaged within a reasonable time after risk has passed to the buyer, section 2-709 entitles the seller to the full price.

There are no significant surprises in the rules on risk for cases of shipment and storage. But there is a significant change from prior law in other cases: if the seller is a merchant, loss does not pass to the buyer until he takes physical possession of them or commits a breach. When the buyer is in breach the seller may for a commercially reasonable time treat the risk as resting on the buyer, but only to the extent of any deficiency

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39. See RESTATEMENT (SECOND) TORTS, § 402A (Tent. Draft No. 10, 1964), followed in *Greeno v. Clark Equipment Co.*, 237 F. Supp. 427 (N.D. Ind. 1965); cf. *Piercefield v. Remington Arms Co.*, 375 Mich 85, 133 N.W.2d 129 (1965); *Santor v. A. & M. Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965); *Yentzer v. Taylor Wine Co.*, 199 A.2d 463 (Pa. 1964). As to Louisiana law, see Note, 19 LA. L. REV. 165 (1958).

in the seller's effective insurance coverage. If the goods are non-conforming and the buyer rightfully revokes acceptance, he may treat the risk as resting on the seller, but only to the extent of any deficiency in his effective insurance coverage. Note the focus on insurance.

To illustrate the effect of these provisions, assume a sale of an identified steam shovel known to be at a particular place, the buyer to drive it away. Under the old law title and risk of loss would pass to the buyer when the contract was made.<sup>40</sup> Under the Code, if the seller is not a merchant, risk passes on tender of delivery, that is, when the buyer has had a reasonable time to take delivery (§ 2-503). If the seller is a merchant, risk passes when the buyer takes physical possession. If by delaying the buyer commits a breach, the risk is on him only to the extent of any deficiency in the seller's effective insurance coverage. After the buyer's delay has continued beyond a commercially reasonable time, the seller again has the full risk. As the comment states, the theory is that a merchant in control of goods can be expected to insure them. Where that expectation is fulfilled, the principal consequence of the Code rules is to deny the seller's insurance company a right of subrogation against a defaulting buyer. That consequence has sometimes been achieved under pre-Code law,<sup>41</sup> and it would of course follow if the seller's insurance policy contained the common clause covering goods sold but not removed.<sup>42</sup>

Where risk has not passed, the seller may be excused under section 2-613 on casualty to identified goods, section 2-614 on failure of means of delivery or payment, or section 2-615 on failure of presupposed conditions. These sections codify in very broad terms the traditional doctrines of impossibility and frustration so far as they give an excuse to the seller, and together with section 2-616 they provide for excuse of the buyer where the seller is excused. The comment to section 2-615 suggests flexible handling of two matters not made explicit in the statutory text: excuse based on frustration of the buyer's purposes, and equitable adjustment in cases of unjust enrichment or change of position.<sup>43</sup>

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40. *Thomas G. Jewett, Jr., Inc. v. Keystone Driller Co.*, 282 Mass. 469, 185 N.E. 369 (1933).

41. See Comment, 22 LA. L. REV. 225, 240 (1961).

42. Cf. *e.g.*, *Waring v. Indemnity Fire Ins. Co.*, 45 N.Y. 606 (1871).

43. Compare *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1943] A.C. 32 (H.L.), with Law Reform (Frustrated Contracts) Act,

*Acceptance and rejection of goods; materiality of breach.* Section 2-601 sets up the basic defensive right of the buyer to reject goods "if the goods or the tender of delivery fail in any respect to conform to the contract." Although it has often been urged that rejection should be limited to cases of material breach, what has been called "the perfect tender rule" has prevailed on two grounds: the buyer should not be required to guess at his peril whether a breach is material, and proof of materiality would sometimes require disclosure of the buyer's private affairs such as secret formulas or processes.<sup>44</sup> The right of rejection for immaterial breach is retained, but it is reduced in importance both by exceptions and by inducements to the buyer not to exercise the right.

Rejection must be within a reasonable time after delivery or tender, and the buyer must notify the seller (§ 2-602). The buyer is entitled to a reasonable opportunity to inspect (§§ 2-513, 2-606), and payment pursuant to a contract calling for payment before inspection does not prevent later rejection (§ 2-512). The buyer may reject the whole, or may accept any commercial unit or units and reject the rest (§ 2-601). In appropriate cases a merchant buyer is under a duty to follow reasonable instructions of the seller and even to resell rejected goods for the seller's account (§§ 2-603, 2-604). The seller may within the contract time cure a non-conforming tender, and if he had reasonable grounds to believe the tender would be acceptable he may have a further reasonable time to cure (§ 2-508). Curable defects are easily waived (§ 2-605). Where the buyer accepts in anticipation of cure or without discovery of latent defects, he may revoke his acceptance and be treated as if he had rejected; but the right to revoke acceptance is limited to cases where non-conformity substantially impairs the value to him of the lot or the commercial unit (§ 2-608). In the case of an installment contract, an installment can be rejected only "if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents"; there is a breach of the whole only if the breach "substantially impairs the value of the whole contract" (§ 2-612).

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1943, 6 & 7 Geo. 6, c. 40; see Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 379-86 (1937).

44. See Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873, 888 (1939); Honnold, *Buyer's Right of Rejection*, 97 U. PA. L. REV. 457 (1949); Malcolm, *The Proposed Commercial Code*, 6 BUS. LAWYER 113, 160, 194-95 (1951); [1956] REP. N.Y. LAW REV. COMM. 36-37, 389-90; Braucher, *The 1956 Revision of the Uniform Commercial Code*, 2 VILLANOVA L. REV. 3, 9 (1956).

Thus the rejecting buyer is subjected to duties, the accepting buyer is protected against surprise, and the right to reject for immaterial breach is negated in several important situations. Acceptance takes place explicitly or by exercise of dominion or by failure to reject (§ 2-606); unless acceptance is revoked, the accepting buyer must pay for goods accepted, must notify the seller of breach or be barred from any remedy, and has the burden of establishing breach (§ 2-607). But despite acceptance a non-conforming delivery may give the buyer reasonable grounds for insecurity under section 2-609 and justify him in demanding adequate assurance of due performance. That section seems not to have been put to the test of litigation, and it bristles with terms of uncertain scope, but it permits a buyer who has "reasonable grounds for insecurity" to demand in writing "adequate assurance of due performance" and "if commercially reasonable" to suspend his own performance. Acceptance of an improper delivery does not prejudice this right as to future performance, and a seller's failure to furnish the assurance within a reasonable time is a repudiation (§§ 2-610, 2-611).

*Contractual remedies.* Here I propose to summarize very briefly the contractual remedies of buyer and seller, leaving to the second lecture the problems of control over the goods.<sup>45</sup> The most significant features of part 7 of article 2 are, first, the limitation of the buyer's right to recover the goods and the seller's right to recover the price to cases where damage remedies are inadequate, and second, the fostering of remedies based on actual resale by the seller or actual substitute purchase by the buyer. Both can be thought of as carrying out the policy against waste which underlies the principle of avoidable consequences or mitigation of damages, or as substituting the equitable principles governing specific performance for rules based on property in the goods.

Sections 2-702 through 2-710 provide for the full array of seller's remedies. The aggrieved seller may withhold or stop delivery, may reclaim from a fraudulent buyer, may identify goods to the contract and resell them to fix his damages, may recover damages for non-delivery based on market price or on lost profits, and in a proper case may recover the price. The

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45. For more detailed discussion of remedies under article 2, see Hogan, *The Highways and Some of the Byways in the Sales and Bulk Sales Articles of the Uniform Commercial Code*, 48 CORN. L.Q. 1 (1962); Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199 (1963).

principal innovations are a provision for recovery of lost "profit (including reasonable overhead)" in cases where damages based on the market are inadequate, as in cases of standard priced goods (§ 2-708), and the limitation of price recovery, in absence of acceptance, loss or damage, to cases of goods not readily resalable.

The buyer's remedies are found in sections 2-711 through 2-717. The principal features are, first, combination of recovery of money paid and revocation of acceptance with damages for non-delivery, free of any requirement of election between rescission and damages, second, damages based on a substitute purchase or "cover" as an alternative to damages based on market price, third, expansion of specific performance beyond "unique" goods to "other proper circumstances," and fourth, elimination of replevin based on property in the goods where "cover" is reasonably available and the seller is solvent.

Sections 2-718 through 2-725 add miscellaneous remedial provisions not found in the Uniform Sales Act. Section 2-718 provides for liquidated damages and for restitution to a defaulting buyer, section 2-719 for contractual modification or limitation of remedy. Succeeding sections preserve damage claims in cases of "cancellation" or "rescission," negate any doctrine of election in fraud cases, provide for actions against third parties, and eliminate difficulties in proof of market price. Section 2-725 establishes a four-year uniform statute of limitations, running from the date of breach regardless of the aggrieved party's knowledge. By the original agreement the parties may reduce the period to not less than one year but may not extend it.

#### PROPERTY, CREDITORS, AND BONA FIDE PURCHASERS

My first lecture dealt with the contractual obligations of buyers and sellers under article 2 of the Uniform Commercial Code. Now we turn to the passage of title or property from seller to buyer and its effect on the rights of third parties, particularly creditors and purchasers. To focus the discussion, let us think first of the seller as a creditor or prospective creditor of the buyer. Primarily we think of him as an unsecured creditor. If he wants to be a secured creditor after the buyer lawfully obtains possession of the goods, he had better comply with article 9 of the Code and perfect a security interest, ordinarily by filing a financing statement.

But until the debtor lawfully obtains possession of the goods, section 9-113 cedes jurisdiction to article 2. If the security interest arises solely under article 2, according to section 9-113, no security agreement is necessary to make the security interest enforceable, no filing is required to perfect it, and the rights of the secured party on default are governed by article 2 and not by article 9. Thus the seller of goods may have the equivalent of a security interest solely by virtue of his status as a seller. Indeed, the definition of "security interest" in section 1-201 and section 2-401 on passing of title both provide that retention or reservation of title or property by a seller of goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest.

There is no novelty in this. I am referring to the seller's lien on goods sold. It is a possessory lien, dependent for the most part on the seller's possession. In article 9 terms, it is a purchase money security interest. What the rights of the parties are depends first on the terms of the contract. As I said in the first lecture, section 2-401 makes title or property relevant only if the situation is not covered by other provisions, and the general effect of article 2 is to give effect to the agreement. Thus, whether we are concerned with the rights between seller and buyer, rights on default, or rights of creditors of either, purchasers from either, or the trustee in bankruptcy of either, we begin with the terms of the contract, in particular with the terms of payment.

*Payment terms.* At this point I incorporate by reference all that I said in the first lecture about the formation of contracts, about offer, acceptance and consideration, about who wins the battle of the forms, about the effect of parol evidence, usage of trade and course of dealing, and about interpretation, modification and waiver. What are the standard terms of payment? And what terms are implied, if no terms are agreed on? Section 2-308 provides in general that the place for delivery is the seller's place of business, and section 2-310 provides that payment is due at the time and place at which the buyer is to receive the goods. This is cash-and-carry; it is sound in the ordinary supermarket. But if it were universal, there would be no problem of credit. We all know that credit is very common even in retail sales to consumers. And between merchants we know that shipment or delivery by the seller is standard and that it is standard practice to pay within a few days after the invoice is received.

The point is that terms of credit, like terms of delivery, need agreement. The agreement may be found in usage of trade, in course of dealing, or in a contract clause. The payment term may be "cash with order," "cash before delivery," "cash on delivery" (C.O.D.); at the other extreme is a "sale or return," where payment is to be made only after the buyer resells, and the seller agrees to take back goods not resold. More standard are open credit terms like "tenth of month following shipment," or "two per cent off for cash in ten days, net cash thirty days." Here "cash" means that no charge is being made for credit within the thirty-day period. The ten days and thirty days, according to section 2-310, run from time of shipment but post-dating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period.

In the absence of any usage or course of dealing or provision in the contract, section 2-310 provides that payment is due at the time and place at which the buyer is to receive the goods. In shipment cases this means when and where the buyer takes physical possession, not the time and place of delivery to the carrier (§ 2-103). Thus there is some credit strain on the seller during transit. On the principle that credit is not extended unless a credit term is agreed to, the seller may ship "under reservation," retaining a security interest. Section 2-505 defines such shipment to include procurement of a negotiable bill of lading either to the seller's order, to the order of a financing agency or to the buyer's order or a non-negotiable bill of lading to himself or his nominee.

On the same principle, the buyer is not required to pay without inspection unless he has so agreed. Thus if a contract calls for shipment but makes no further provision, the seller can ship under a bill of lading to shipper's order, attach the bill to a sight draft on the buyer, and deliver the documents through banking channels (§ 2-308). But the buyer is entitled to inspect the goods after arrival and before payment. If the contract provides for delivery by way of documents of title, however, payment is due at the time and place at which the buyer is to receive the documents, and the buyer has no right to inspect before payment (§ 2-513). "Cash against documents" or "C.O.D." terms have this effect, as does "C.I.F." unless "payment on or after arrival" is added. Where payment before inspection is agreed to, a buyer who pays retains the right to inspect, reject the goods, and recover the payment; but the buyer who fails to pay is ordinarily

not excused by non-conformity (§ 2-512). Indeed, he may never learn whether the goods are non-conforming or not.

If the contract provides for a period of open credit, shipment under reservation is a breach even though inspection by the buyer before payment is permitted. The seller's security interest is effective nonetheless, but "the rights given to the buyer by shipment and identification of the goods to the contract" are not impaired (§ 2-505). In such a case, however, the breach is characterized as "an improper contract for transportation" within section 2-504, and that section seems to limit rejection on that ground to cases where "material delay or loss ensues."

It is very common to provide that credit terms may be cancelled if the buyer's credit becomes impaired. Thus the Standard Cotton Textile Salesnote set out in the 1960 edition of the Worth Street Rules provides, "Seller or seller's agent shall have the right, from time to time, on any unfilled portion of this contract, to limit any credit to be extended hereunder or to require payment before delivery, provided, always, that proper adjustment of discount or allowance of anticipation for such prepayment, be made. In the event that seller or seller's agent should exercise this right, buyer agrees to accept invoices subject to such modified conditions and expressly waives any right to cancel which such modification might be construed to have created." Other typical clauses permit the seller to demand payment before the end of the usual credit period if he deems himself insecure, if the buyer goes into bankruptcy, and the like.

Section 1-208 provides that in such cases "at will," "when he deems himself insecure," or words of similar import shall be construed to give the creditor power to accelerate "only if he in good faith believes that the prospect of payment or performance is impaired." As defined, "good faith" here means that the belief is honest; it need not be reasonable. And the burden of establishing lack of good faith is on the debtor. One can imagine a case where the buyer's credit improves after the contract is made, but the seller accelerates with some ulterior motive. For example, the buyer is temporarily short of cash, and the seller wants to get out of an unfavorable contract. In that situation, the Code provides a basis for a claim that the seller has wrongfully exercised his power of acceleration.

Section 2-609 provides something like a power of acceleration, but without any contract clause. Under that section each



party to a contract for sale is under an obligation that the other party's expectation of receiving due performance will not be impaired. If something happens which impairs a seller's expectation of being paid, he may in writing demand adequate assurance of due performance and may if commercially reasonable suspend deliveries which have not been paid for. Failure to provide adequate assurance within a reasonable time not exceeding thirty days amounts to a repudiation by the buyer. Under sections 2-610 and 2-611 repudiation permits the aggrieved seller to resort to any remedy for breach.

This is a generalized equivalent of the acceleration clause, but it is limited to cases where there are "reasonable grounds for insecurity" rather than a mere honest belief, and the remedy is to suspend performance and stop delivery rather than to speed up payment. The rule of law as stated is novel, although the comment refers to statutory and judicial precedents, but the practice is not. If a seller is not going to get paid, he does not ship the goods, whatever the law says. Often he had a fair chance, under pre-Code law, of defending against a claim for damages by the buyer. But he was likely to lose his own claim for damages unless he could show that the buyer was actually insolvent or was first in breach. Section 2-609 provides machinery, fair to both parties, where the situation is unclear.

*Rights of a seller in possession.* Let us turn to the seller's power to control the goods where he is the aggrieved party. I shall begin with the seller in possession, then deal with goods in transit and with reclamation from the buyer. At each stage I shall refer also to the possibility that creditors of the buyer or purchasers from the buyer may have competing interests.

Before goods are identified to the contract, of course, the buyer has no interest in any particular goods. By identification, according to section 2-401, he acquires "a special property as limited by this Act," and that interest is excluded from the definition of "security interest" (§ 1-201). The seller's interest after identification is not so excluded; apparently it may or may not be a "security interest," except that after shipment or delivery to the buyer any reservation of an interest by the seller is limited in effect to the reservation of a security interest. But the provisions of section 2-401 apply only to situations not otherwise covered, where "matters concerning title become material."

Identification is defined in section 2-501. Unlike "appropriation" in the Uniform Sales Act, identification may apparently be the unilateral act of the seller, even though the goods identified are non-conforming; it may occur "when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers." The buyer then has a special property and an insurable interest, but the seller may also have an insurable interest, and where the identification is by the seller alone he may until default or insolvency or notification to the buyer that the identification is final substitute other goods. Either buyer or seller may sue a third party for injury to goods; the suit or settlement of the party who does not have the risk of loss is, subject to his own interest, as fiduciary for the other (§ 2-722).

In this situation, the seller in possession has more than a security interest at least so long as he bears the risks of loss. Moreover, he has reasonably complete legal power over the goods in the event of the buyer's default or insolvency. In the event of insolvency he may refuse delivery except for cash (§ 2-702); in the event of breach he may withhold delivery (§ 2-703), may identify conforming goods to the contract if they are in his possession or control at the time he learns of the breach, and may treat as the subject of resale goods demonstrably intended for the particular contract even though unfinished. He may complete manufacture "in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization," or he may resell unfinished goods for scrap or salvage value or proceed in any other reasonable manner (§ 2-704).

Section 2-706 permits the seller to resell in order to fix his damages. Such a resale is much like a resale to enforce an article 9 security interest, except that there is no duty to account for any profit on the resale. The seller resells at public or private sale in any commercially reasonable manner, and can then recover the difference between the contract price and the resale price together with incidental damages, but less expense saved. Although the seller can keep any profit made on a resale, a financing agency or other holder of a security interest or "person in the position of a seller" (§ 2-707) must account for any excess over the amount of his security interest. Alternatively, the seller may keep the goods or sell them for his own account and recover damages based on market price. All these rights of the seller in possession, whether or not they are called a security

interest, seem to be superior to the interests of creditors of the buyer and purchasers from the buyer.

*Goods in storage and in transit.* Where goods are out of the seller's possession but have not yet reached the buyer, section 2-705 confers on the seller a right to stop delivery by notifying the carrier or other bailee. Like the traditional right of stoppage in transit, this right arises in cases of insolvency of the buyer; it is extended to other grounds for withholding or reclaiming goods in cases of carload, truckload, planeload, or larger shipments of express or freight. The right terminates when the buyer receives the goods, when a bailee other than a carrier acknowledges to the buyer that he holds the goods for the buyer, when a carrier so acknowledges by reshipment or as warehouseman, or when a negotiable document of title is negotiated to the buyer. The right is subject to the rights of the bailee and of any person to whom a negotiable document of title has been duly negotiated.

If the seller has shipped under reservation, he has similar powers by virtue of his security interest and the powers given him by the document of title, but the powers are not limited to cases of insolvency or carload shipments. Where a draft relating to a shipment is paid or purchased by a financing agency, the financing agency acquires the seller's rights in the goods, including the right to stop delivery and the right to have the draft honored by the buyer (§ 2-506). Documents attached to a draft are to be delivered on acceptance of the draft if payable more than three days after presentment; otherwise, only on payment (§ 2-514). Thus a sight draft with order bill of lading attached is much like shipment C.O.D., except that collection through banking channels is contemplated, rather than collection by the carrier. In all these cases the seller or financing agency who stops delivery can resell like a seller in possession.

*Reclamation.* Article 2 gives the seller control over goods in the buyer's possession in some circumstances even though the seller does not reserve a security interest. Here we must deal with sale on approval, sale or return and certain consignments, with cash sales, and with misrepresentations by the buyer. Where the buyer has an option to return conforming goods, section 2-326 provides that there is a "sale on approval" if the goods are delivered primarily for use, a "sale or return" if the goods are delivered primarily for resale. Goods on approval are

not subject to the claims of the buyer's creditors until acceptance, goods held on sale or return are subject to such claims while in the buyer's possession.

Delivery of goods to an agent of the seller is normally not a sale within the meaning of article 2. But section 2-326 covers certain consignments for sale. Where goods are delivered to the consignee for sale, and the consignee maintains a place of business at which he deals in such goods under a name other than the consignor's, "with respect to the claims of creditors" of the consignee "the goods are deemed to be on sale or return." Three modes of escape are provided: an applicable law providing for a sign showing the consignor's interest, general knowledge that the consignee is substantially engaged in selling the goods of others, and compliance "with the filing provisions" of article 9. It should also be noted that article 9 applies fully to a "consignment intended as security" (§ 9-102), but that the definition of "security interest" excludes a consignment not intended as security (§ 1-201).

Thus there are two types of consignments referred to in the Code. A consignment intended as security is a security interest in inventory and must normally be perfected by filing, but in some circumstances it may be perfected for twenty-one days without filing (§ 9-304); it will ordinarily be entitled to priority as a purchase money security interest, but only if notification is given to a competing secured party who filed first (§§ 9-107, 9-312). A "true" consignment, on the other hand, is an agency for most purposes but is deemed to be a sale or return as against creditors. The "deeming" will prevent reclamation in the bankruptcy of the consignor, but the right to reclaim can be saved by compliance with the "filing provisions" of article 9. Are the "filing provisions" limited to the provisions on the mechanics of filing in part 4 of article 9, entitled "Filing"? Or do they also include provisions as to when filing is required, the consequences of non-filing, and priority of filed interests? The phrase "filing provisions" seems to be used in the narrower sense in section 9-302(3), and this is the simpler and clearer reading, but a consignor might be wise to take the necessary steps under both readings. For example, he might well give the notification called for by section 9-312. We get no help on these questions from judicial decisions; the only decision thus far is a Massachusetts

case denying a consignor a right to replevy from an assignee for the consignee's creditors where there had been no filing.<sup>46</sup>

The rights of a consignor may also be defeated by a bona fide purchase from the consignee. Section 2-403 would protect a "buyer in ordinary course of business," a concept to be discussed hereafter. Where that section is inapplicable the purchaser might be protected by the law of agency or by a selling factor's act. If the consignee granted a security interest without authority, the secured party could apparently take advantage of a failure of the consignor to file by virtue of the fact that "creditor" is defined to include "a secured creditor" (§ 1-201). The importance of consignment as a mode of distribution may be somewhat reduced by a recent Supreme Court decision under the anti-trust laws,<sup>47</sup> but that is not within our present scope.

A second basis for reclamation is the cash sale. "Where payment is due and demanded on the delivery to the buyer of goods or documents of title," according to section 2-507, "his right as against the seller to retain or dispose of them is conditional upon his making the payment due." The comment adds that the condition may be waived by the seller's failure to follow up his rights, and that the ten-day limit of section 2-702 is applicable. The section must be read with the provision in section 2-511 that payment by check is conditional and is defeated as between the parties by dishonor. The comment states that insofar as third parties are concerned acceptance of a post-dated check amounts to a delivery on credit and remits the seller to section 2-702, but that as between buyer and seller section 2-507 on conditional delivery remains applicable.<sup>48</sup> This suggests that if the check is not post-dated and the condition is not waived the seller prevails over the buyer's creditors and hence over his trustee in bankruptcy. Even if the seller's right to reclaim is considered to be a security interest, this result can be reconciled with section 9-113 on the ground that the buyer in such a case does not "lawfully" obtain possession.<sup>49</sup> But a good faith purchaser from the buyer for value is explicitly protected in all such cases by section 2-403 on the ground that the buyer has a voidable title. A

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46. *General Electric Co. v. Pettingell Supply Co.*, 199 N.E.2d 326 (Mass. 1964).

47. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

48. See *Commonwealth v. Kelinson*, 199 Pa. Super. 135, 184 A.2d 374 (1962).

49. *McAuliffe & Burke Co. v. Gallagher*, 258 Mass. 215, 154 N.E. 755 (1927); see 3 WILLISTON, *SALES* § 620 (rev. ed. 1948).

person to whom the buyer gives a security interest is accorded this protection as a "purchaser" (§ 1-201).

The third type of right to reclaim relates to goods delivered on credit to an insolvent buyer. Section 2-702 gives the seller a right to reclaim in such cases. The right is severely limited, and displaces any other right to reclaim based on "the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay." Other grounds for avoiding the buyer's title are not within the scope of the section, but may be subject to similar rules either by analogy or as a matter of common law. Under the section no finding of misrepresentation is required; the right to reclaim arises automatically if the seller makes a demand within ten days after an insolvent buyer receives goods on credit. The ten-day limit does not apply, however, if the buyer has made a misrepresentation of solvency to the particular seller in writing within three months before delivery. As in other cases of voidable title, section 2-403 protects the good faith purchaser from the buyer for value. Successful reclamation bars all other remedies with respect to the same goods, because in the words of the comment reclamation "constitutes preferential treatment as against the buyer's other creditors."

The sponsors recognized from the beginning that the right of reclamation might not be honored in bankruptcy, particularly where no fraud was shown. But the sponsors relied on decisions allowing reclamation in bankruptcy on the basis of what the comment calls a "tacit business misrepresentation of solvency." As a sponsors' subcommittee reported in 1955, "Comment 2 sets up a fraud theory which might well be followed under the Federal Bankruptcy Act to preserve the right of reclamation granted by this section. . . . But state law cannot resolve such questions, and should not try."<sup>50</sup> The opinion in *In re Kravitz*<sup>51</sup> is consistent with the sponsors' hopes on this point, but it disclosed another difficulty. According to section 2-702 the seller's right to reclaim is "subject to the rights of a buyer in ordinary course or other good faith purchaser or lien creditor under this

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50. See UCC Supp. No. 1, at 106, Jan. 1955, citing *California Conserving Co. v. D'Avanzo*, 62 F.2d 528 (2d Cir. 1933); cf. *Kamberg v. Springfield Nat'l Bank*, 293 Mass. 24, 199 N.E. 339 (1935); Hogan, *The Marriage of Sales to Chattel Security in the Uniform Commercial Code*, 38 B.U.L. Rev. 571 (1958).

51. 278 F.2d 820 (3d Cir. 1960); see Hawkland, *The Relative Rights of Lien Creditors and Defrauded Sellers*, 67 Com. L.J. 86 (1962); Kennedy, *The Trustee in Bankruptcy under the Uniform Commercial Code*, 14 RUTGERS L. REV. 518 (1960); Shanker, *A Reply to the Proposed Amendment of UCC Section 2-702(3)*, 14 W. RES. L. REV. 93 (1962).

Article (Section 2-403)." The reference to buyers and purchasers is clear enough, but all section 2-403 says about "lien creditors" is that their rights are governed by articles 6, 7, and 9. In this situation the court looked to the pre-Code law of Pennsylvania, found that a lien creditor who extended credit subsequent to the sale would prevail over a defrauded seller, and held that the trustee as an "ideal lien creditor" under section 70c of the Bankruptcy Act similarly prevailed.

In this situation the sponsors of the Code in Illinois, with Professor Llewellyn, the chief draftsman, participating, omitted the words "or lien creditor" from section 2-702, intending to avoid the *Kravitz* result, and several states followed the Illinois lead.<sup>52</sup> A sponsor's subcommittee recommended approval of the Illinois solution, but the Editorial Board was "not convinced that the decision in *In re Kravitz* requires an amendment of this section," stating the Pennsylvania rule applied in that case and adding that "In most states the pre-Code law was otherwise."<sup>53</sup> A new paragraph of comment was added, explaining that the rights of lien creditors under article 2 include rights under section 2-326 on consignment sales as well as rights under articles 6, 7, and 9, and accepting *In re Kravitz* as an application of supplementary principles (§ 1-103) not displaced by section 2-702.

The bankruptcy rule applied in the *Kravitz* case, that section 70c of the Bankruptcy Act gives the trustee the status of an "ideal lien creditor," is now of doubtful standing. The Supreme Court has denied that the trustee can assert the rights of a hypothetical creditor extending credit during a period of delay in filing, when no actual creditor had such rights.<sup>54</sup> It would be a short step to deny him any rights given only to a special class of creditors, unless there was an actual creditor who was a member of the class.<sup>55</sup> If this view should prevail, the seller's right to reclaim could be defeated, even in Pennsylvania, only if some actual creditor extended credit to the bankrupt after the fraudulent sale.

*The buyer's right to recover goods.* Now let us shift our attention to the situation where the buyer is aggrieved by the

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52. California, Maine, New Jersey, New Mexico, and New York.

53. See REPORT NO. 1 OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 70, 137 (1962); note 49 *supra*.

54. *Lewis v. Manufacturers Nat'l Bank*, 364 U.S. 603 (1961).

55. *Cf. Pacific Fin. Co. v. Edwards*, 304 F.2d 224 (9th Cir. 1962).

conduct of the seller. The buyer's interest in identified goods, you will remember, is not a security interest. The buyer can get a security interest by complying with article 9, but unless he does so his interest is called a special property. It carries with it an insurable interest and a right to sue third-party tortfeasors. When substitute goods are not readily available, the buyer may have a right to specific performance or replevin. These are rights of the beneficial owner, and are probably not within the condemnation of "equitable liens" in section 60a of the Bankruptcy Act. The same may be said of the right to replevy under section 2-502 if the seller becomes insolvent within ten days after receipt of the first installment on their price, but rights arising on insolvency may be vulnerable in bankruptcy as state-created priorities. The theory of the draftsmen was that pre-Code law permitted replevin based on property much more broadly, that the effect of the Code was to limit the right given the buyer by pre-Code law, which was effective in bankruptcy. On this theory, the right to replevin is not a mere priority, and it would be defeated by the seller's bankruptcy only if the seller's creditors could defeat it. This brings us to the question what rights the creditors of a seller have to sold goods in his possession. We are now assuming that the buyer has not perfected an article 9 security interest.

*Rights of the seller's creditors.* Section 2-402 provides that with two exceptions the rights of the seller's unsecured creditors are subject to the buyer's rights to recover identified goods. One exception saves any rule of law under which the seller's retention of possession is fraudulent, but provides that retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale is not fraudulent. The other exception preserves rules of law defining fraudulent transfers or voidable preferences in transactions not in current course of trade.

Probably the prevailing view is that a seller's retention of possession is *prima facie* fraudulent, but that fraud may be rebutted by proof of the buyer's good faith. In some states, however, retention of possession is fraud *per se*. The Code carries forward the difference of opinion, following the example of the Uniform Sales Act, except for the case of the merchant-seller in current course. In Massachusetts, the rule of *Lanfear v. Sumner*<sup>56</sup> was not originally a rule of fraud, but simply a rule

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56. 17 Mass. 110 (1821).



that property did not pass except as between the parties until there was a delivery. But the Sales Act carried the rule forward,<sup>57</sup> and the similar language of the Code should have the same effect.

The rule that retention of possession is *prima facie* fraud or fraud *per se* may give protection to secured creditors of the seller. Only unsecured creditors are covered by section 2-402(1), but subsection (2) on fraudulent retention of possession applies to "a creditor," and the definition of creditor includes secured creditors (§ 1-201). If there is no fraud on creditors, a buyer who gives value and receives delivery without knowledge takes free of an unperfected security interest (§ 9-301); a buyer in ordinary course takes free of a perfected security interest (§ 9-307). We will return to the definition of buyer in ordinary course; suffice it for now that it probably only applies when the buyer receives the goods. While the goods are in the seller's possession, there seems to be no provision subjecting the buyer's special property to a security interest subsequently created by the seller, except for the fraud provision. Aside from fraud, then, priority would seem to depend on which interest is created first.

*Buyers in ordinary course.* Where a seller retains possession of goods sold and then resells to a second buyer, the Code protects the second buyer only if he is a "buyer in ordinary course of business." This is the effect of section 2-403(2), one of the most widely discussed provisions of the Code, to which I have referred several times. It has a broader scope than cases of sellers in possession: "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business." Perhaps its principal application will be to cases of entrusting by financial institutions, as where a finance company repossesses an automobile and leaves it with a used-car dealer.<sup>58</sup> Discussion has often focused on the watch entrusted for repair to a jeweller who also sells watches, but such cases are less likely to be prominent in litigation.

"Buyer in ordinary course of business" is a narrower term in several respects than the "good faith purchaser for value"

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57. *Hesse v. Lockwood*, 264 Mass. 524, 163 N.E. 86 (1928).

58. *Of. Budget Plan, Inc. v. Savoy*, 336 Mass. 322, 145 N.E.2d 710 (1957); *Sterling Acceptance Co. v. Grimes*, 194 Pa. Super. 503, 168 A.2d 600 (1961).

who takes a good title from a seller with a voidable title. Both must take in good faith and for value, and the value may be a mere promise to pay. But "purchase" includes taking in bulk or as security for or in total or partial satisfaction of a money debt; "buyer in ordinary course" excludes such transactions and purchases by pawnbrokers. To buy in ordinary course one must buy from a person in the business of selling goods of that kind (§ 1-102).

What of delivery? The "good faith purchaser for value" who gets a good title under section 2-403 apparently need not take possession. In this respect he is different from the person to whom a negotiable document of title is "duly negotiated" (§ 7-501), from the "bona fide purchaser" of an investment security (§ 8-302), and the buyer not in ordinary course who takes free of an unperfected security interest (§ 9-301); in the three latter cases "delivery" is explicitly required. As to the "buyer in ordinary course of business," the definition states that "'Buying' . . . includes receiving goods or documents of title under a preexisting contract for sale" and I infer that "Buying" does not take place for this purpose at any earlier stage. This conclusion is not entirely free from doubt, but it reaches sound results and conforms to the definition in the Uniform Trust Receipts Act which is said in comment to be the source of the definition. There is no hint of any intent to make a change on this point, and it seems doubtful that so important a change would have been left to inference.

*Rights of the buyer in possession.* Section 2-711 provides that the buyer who rejects or revokes acceptance has a security interest in goods in his possession or control for any payments made on their price and for his expenses. Such a security interest arises under article 2, and he may resell like an aggrieved seller but must account for any surplus (§ 2-706).

In other cases the buyer who takes possession and whose rights are not voidable by the seller acquires all title which the seller had or had power to transfer (§ 2-403). These rights include those already referred to in connection with the discussion of the good faith purchaser for value and the buyer in ordinary course of business. The buyer remains subject, however, to the rights of a former owner who did not deliver the goods under a transaction of purchase or entrust them to a merchant who deals in goods of that kind. And a buyer who is not pro-

tected as a good faith purchaser or buyer in ordinary course remains subject to defects in his seller's title and to the claims of the seller's creditors under the law relating to fraud on creditors and voidable preferences. Most such claims are left to other bodies of law, but article 6 of the Code provides for the avoidance of bulk sales.

*Bulk sales.*<sup>59</sup> The basic purpose of the bulk sales laws is to deal with two common forms of commercial fraud involving a merchant owing debts who sells out his stock in trade. In one form, the sale is a sham and the seller hopes to come back later; in the other, he simply disappears. The remedy, carried forward by the Code, is to require advance notice to creditors. The Code provisions are somewhat more detailed and, I think, clearer than the prior statutes, and they exempt a number of transactions where the delay and red tape are not justified.

The Code provisions apply if there is a transfer in bulk, not in the ordinary course, of a "major part" of the inventory of an enterprise whose principal business is the sale of merchandise from stock. A "major part" is commonly understood to mean more than half. Manufacturers may be covered, but intangibles are not. Equipment is covered only in connection with a transfer of inventory. Service enterprises are excluded because unsecured credit on the faith of inventory is uncommon. Lower courts in Pennsylvania have held a restaurant-taproom covered, but a printer not.<sup>60</sup> Security transfers, foreclosure and execution sales and the like, and transfers of exempt property are exempt, as are transfers to successor businesses which give public notice and assume the transferor's debts, if the transferee is solvent or the transferor receives nothing except an interest junior to creditors.

When a transfer is covered, the transferor must furnish a sworn list of creditors and a schedule of the property, and the transferee must preserve the list and schedule or file them in a public office. The transferee must give notice to the creditors at least ten days before he takes possession or pays. A short form of notice is provided where the debts are to be paid, a longer form in other cases. Special provision is made for auctioneers. The creditors in question are all those holding

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59. Compare LA. R.S. 9:2961-2968 (1950).

60. *Uhr v. 3361, Inc.*, 21 Pa. D. & C.2d 348 (1960); *Markert v. College Offset Press, Inc.*, 6 Pa. D. & C.2d 519 (1957).

claims based on events before the transfer, apparently including disputed and unliquidated claims.

Failure to comply renders the transfer ineffective against creditors of the transferor, except that an innocent transferee is protected against errors in the list of creditors. The Supreme Court of Pennsylvania has held that the transferee cannot avoid the sale for non-compliance.<sup>61</sup> An optional section adopted in nine states<sup>62</sup> imposes a duty on the transferee to see that creditors are paid; other states impose no such duty.<sup>63</sup> Good faith purchasers from the transferee for value and without notice are protected, apparently without regard to delivery, and a six months statute of limitations is provided, barring both actions and levies unless the transfer has been concealed.

It may be worth pointing out that the sanctions for non-compliance can be severe. If a bulk transfer is carried out in blithe disregard of the statute, as has often happened under prior statutes, the transferee may pay the full price once to the transferor and a second time to creditors who later appear. He may then think he is safe, but the transfer remains ineffective against other creditors still undiscovered. In a state where the transferee has a duty to see creditors paid, this third round of liability is avoided by giving credit for sums believed in good faith to be properly payable; in other states liability can be limited by surrendering the property. A safe course if there is no concealment is to place the price in escrow until the six-month limitation period has run.<sup>64</sup>

We may close with the bizarre situation which arose in *In re Dee's, Inc.*<sup>65</sup> A merchant made a bulk transfer to his own wholly-owned corporation, without complying with the statute. The corporation soon became bankrupt, and later the merchant also became bankrupt. The two trustees in bankruptcy both claimed the property, and the court ruled that the transferee's trustee prevailed because his rights attached first. The holding

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61. *Macy v. Oswald*, 198 Pa. Super. 435, 182 A.2d 94 (1962).

62. Alaska, Kentucky, Maryland, Montana, New Jersey, Oklahoma, Pennsylvania, Tennessee, West Virginia. This list does not cover enactments during 1965.

63. *Cf. Albertson v. Williams*, 108 Ga. App. 627, 133 S.E.2d 897 (1963).

64. In Massachusetts there was no such time limit before the Code, and a suit after twelve months was held not barred by laches. *Security Nat'l Bank v. General Motors Corp.*, 345 Mass. 434, 187 N.E.2d 820 (1963).

65. 311 F.2d 619 (3d Cir. 1962).

seems to be based on a principle which would be rejected in most states, that a levying creditor has the rights of a bona fide purchaser.<sup>66</sup>

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66. See note 49 *supra*.